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August 11, 1997

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Amendment of Rules and Policies Governing Pole Attachments, CS Docket No 97-98 — REPLY COMMENTS

Dear Mr. Caton:

Enclosed herewith for filing are the original and four (4) copies of MCI Telecommunications Corporation's Reply Comments regarding the above-captioned matter.

Please acknowledge receipt by affixing an appropriate notation on the copy of the MCI Comments furnished for such purpose and remit same to the bearer.

Sincerely yours,

Lawrence Fenster

No. of Copies rec'd 0+4

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Rules and	)	**CS Docket No. 97-98**
Policies Governing Pole	)	
Attachments	)	

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

Lawrence Fenster
MCI Telecommunications Corp.
1801 Pennsylvania Ave., NW
Washington, D.C. 20006

August 11, 1997

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Summary

Congress recognized that the economic feasibility of new entry into local telephone markets significantly depended on the ability of new entrants to obtain access to utility company poles, ducts, and conduits at just and reasonable, non-discriminatory rates. This ability is particularly crucial for the development of facilities-based competition. In these Reply Comments, MCI rebuts the proposals made by utility companies that, if implemented, would prevent the establishment of just and reasonable attachment rates for poles, conduits, and transmission facilities, and inhibit the development of facilities-based competition.

The Commission must affirm its jurisdiction to regulate rates, terms, and conditions for attachments to electric company transmission facilities, conduit, and other rights of way. In its Interconnection Order, the Commission clearly stated that transmission facilities were included in pole attachments as a matter of law. Since the Commission has determined that it has jurisdiction over transmission facilities, it would constitute an unreasonable delay of entry not to apply the pole rate formula to transmission facilities in this proceeding. The 1996 Act is also very clear that the Commission must regulate conduit rates.

Very little effort would be involved in adapting the Commission's existing pole attachment formula to electric utility transmission facilities. The relevant asset and expense accounts are found in FERC Accounts 354, and 355; and an allocated share of Accounts 566, 571.1, 571.3, 574.1, and 574.3. The Commission could immediately initiate a FNPRM to determine presumptive heights, and usable space on transmission

facilities. In the meantime, the Commission should require electric utilities to estimate transmission pole height and usable space; and make those estimates available for negotiations.

The Commission should establish cost-based formulae determining presumptive maximum rates for attaching to poles, conduits, and transmission facilities. The market for public rights-of-way is highly concentrated. Only electric and telephone utilities have local distribution networks capable of reaching all customers in a serving area. Moreover, bargaining power is not evenly distributed among negotiating parties. Consequently, parties supplying this market would be able to set prices far in excess of competitive levels if rates were determined through market negotiations. The only way to achieve just and reasonable rates for attachments to public rights-of-way is for regulators to establish rates close to economic cost.

Setting maximum presumptive rates will foster negotiation. It will set clear limits concerning the presumed maximum rate, but will give utilities the flexibility to show that their costs are above the formulaic rate. It requires utilities to keep track of their relevant costs, and make that information available to the other party, facilitating full information, and promoting fair negotiation. It also sets observable limits on the range of outcomes, thus reducing the chance that negotiations will break down.

MCI has been a strong and consistent proponent of properly conceived forward looking cost estimates and believes that a properly conceived forward looking cost estimate of pole attachment costs would yield declining rates over time. However, because §224(i) of the 1996 Act requires forward looking upgrade costs to be excluded

from recurring rates, the Commission is precluded from using a forward looking cost method for poles, conduits, and other rights-of-way.

The Commission should reject the proposals of the electric utility companies to alter the usable space assumptions pertaining to poles. They fail to document their average pole height; ignore evidence that a significant percentage of their 30 foot poles provide multiple attachments, and ignore features of the National Electrical Safety Code that validate a presumptive 15.5 feet of ground clearance and allocation of the safety space to electrical purposes.

After reviewing other parties' initial comments, it is clear that no one has shown even the theoretical possibility that pole attachment rates will become negative. SBC confirms MCI's contention that negative carrying charge rates will offset the negative net pole value. Consequently, the Commission should leave its existing pole attachment formula untouched. Suggested changes are at best unnecessary, and at worst will increase administrative cost, unsettle the relatively straightforward manner in which pole attachment agreements have been conducted, and create an opportunity for unjustified rate increases.

The electric utilities have proposed adding many accounts to rate base and expenses that would dramatically increase pole attachment rates. The Commission should reject these proposals as well. These proposed accounts are either already recovered through make-ready charges, or involve costs that are attributable to the transmission or distribution of electric current through the electric grid — a function solely attributable the electric company.

The Commission must permit, and account for, the joint use of fiber and electric cable in the same duct. A variety of new electric technologies are increasing the capacity of existing electrical cable in trenches and conduits, freeing up space on a going-forward basis, and increasing the opportunities for shared occupancy of ducts by telecommunications' and electric cables. The electric companies will be able to lay fiber in their conduit systems (and the NESC will permit this) on behalf of their communications affiliates. They will also be able to pull a fiber cable through a duct partially occupied by one of their electric supply cables. The Commission therefore, must make this same technically feasible space available to companies that are not affiliated with the electric company.

After making only minor adjustments, the Commission may apply its pole attachment formula to conduits. FCC Accounts 2423 and 6423 for buried telephone facilities, and FCC Accounts 2441 and 6441 for underground telephone conduit systems accurately capture relevant telephone company conduit costs. FERC Accounts 357, 366, 572.2, 574.4, 594.1, 594.3, and 594.1.3 accurately capture relevant electric company conduit costs.

The Commission must account for innerducting in the conduit formula for application to both telephone and electric companies. In their Comments, non-incumbents showed that a standard duct can be subdivided 3-4 times, sometimes even more. MCI's proposed use of 3.5 innerducts per duct reasonably captures existing practice. In addition, new entrants that gain access to incumbent conduit by having innerduct installed must be charged a recurring rate based on the amount of usable

space they occupy, since they will have already paid for the non-recurring installation of innerducts. Otherwise the incumbent utility will double-recover its conduit costs.

The Commission should set the presumed number of reserved innerducts no higher than "one" (1). Cable and communications attachees are generally denied access to reserve space in utility conduit. Communications' repairs can also be accomplished in the absence of a reserve innerduct. If a reserve innerduct is made available at all, there is no need to presume that more than one should be reserved for communications' maintenance in any conduit system.

MCI implores the Commission to quickly apply its pole attachment formula to both telephone and electric conduit. MCI also implores the Commission to implement clear rules that are easy to administer and enforce. Incumbent utilities often insist on unreasonable provisions in their pole attachment contracts. Incumbent utilities control a resource that is essential for facilities-based entry into the local exchange market. This resource is scarce and without substitute. New entrants are at a significant negotiating disadvantage gaining access to this scarce resource.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Rules and Policies Governing Pole Attachments	)	**CS Docket No. 97-98**
	)	
	)	

I. *Introduction*

MCI Telecommunications Corporation ("MCI") respectfully submits its Reply Comments in response to comments filed in the above-captioned docket[1]. In the Notice, the Commission requested comments on proposed modifications to its rules relating to the maximum just and reasonable rates utilities may charge for attachments made to their poles, ducts, conduits, and rights-of-way. In particular, the Commission requested comment on the appropriateness of its existing pole attachment formula, the appropriateness of presumptions used to determine the maximum allowable pole attachment rate, various accounting changes, and the appropriateness of its proposed methodology for setting maximum allowable rates for conduit.

In these Reply Comments, MCI rebuts the proposals made by utility companies that, if implemented, would prevent the establishment of just and reasonable attachment rates for poles, conduits, and transmission facilities, and inhibit the

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[1] *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No 97-98.

development of facilities-based competition. MCI implores the Commission to quickly apply its pole attachment formula to both telephone and electric conduit. MCI also implores the Commission to implement clear rules that are easy to administer and enforce. Incumbent utilities often insist on unreasonable provisions in their pole attachment contracts. Incumbent utilities control a resource that is essential for facilities-based entry into the local exchange market. This resource is scarce and without substitute. New entrants are at a significant negotiating disadvantage gaining access to this scarce resource.

II. The Commission Should Not Delay Extending the Pole Attachment Formula to Transmission Facilities

A. The Commission Has Jurisdiction over Transmission Facilities

The electric utilities request the Commission delay applying its existing pole attachment formula to transmission facilities until the Commission resolves issues surrounding the regulation of the rates, terms, and conditions of access to transmission facilities raised in its Local Interconnection Order.[2] The electric utilities imply that because the Commission agrees it has not resolved all issues surrounding access to transmission facilities, the Commission also agrees that it may not have the jurisdiction to set rules regulating maximum rates for access to transmission facilities.[3]

However, the Commission has been very clear that it does have the jurisdiction

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[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, *First Report and Order*, (Interconnection Order), CC Docket No. 96-98, 11 FCC Rcd 15499 (1996).

[3] Comments: American Electric Power (AEP) at 7; Edison Electric Institute and UTC, (EEI) at 3.

to set rules regulating maximum rates for access to transmission facilities. In its Interconnection Order, the Commission clearly stated that transmission facilities were included in pole attachments as a matter of law. The only limitations the Commission considered, involved grounds for denying specific requests for access to transmission facilities when justified by the nature of the transmission facility or the type of facility proposed for attachment.[4]

Thus, the question of jurisdiction is not undecided as electric utilities claim, at least in the mind of the Commission. If challenges initiated by the electric utilities were sufficient to cause a matter to be unresolved, the matter would remain undecided for many years, as the electric utilities drag the issue through district courts, legislative proposals, and Supreme Court challenges. Since the Commission has determined that it has jurisdiction over transmission facilities, it would constitute an unreasonable delay of entry not to apply the pole rate formula to transmission facilities in this proceeding.

B. Conditions Limiting Rate-setting to Poles Have Changed

The electric utilities also argue that because the Commission has not historically developed a rate formula for transmission facilities, or conduits for that matter, transmission structures and conduit are not "poles" under the act.[5] This conclusion is

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[4] We presume that the size, weight, and other characteristics of attaching equipment have an impact on the utility's assessment of the factors determined by the statute to be pertinent - capacity, safety, reliability, and engineering principles. The question of access should be decided on those factors." Interconnection Order at para 1186.

[5] "...the Commission has never before included the costs of transmission facilities in its pole attachment rate calculations. Therefore, transmission (continued...)

completely unsupported. The 1996 Act clearly included transmission facilities, conduits, and other rights-of-way in its definition of "pole."[6] The Commission has not considered attachment rates for anything other than distribution poles until now because coaxial cable has been well suited to distribution pole attachment, and attachment to distribution poles has satisfied the cable industry's business requirements. With the development of multiple innerducting made possible through the use of small fiber cable, and the immunity of fiber cable from electric induction, attachments to transmission facilities, ducts, and conduits is now technically feasible and desired by new entrants.

The law includes all utility rights-of-way. The electric utilities do not directly dispute this point. Rather, they argue that only non-wireline technologies are capable of attaching to transmission facilities, and that the Pole Attachment Act only applies to wireline attachments.[7] Leaving aside the question of whether or not the Pole Attachment Act permits attachments by wireless facilities, it is also technically feasible

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5 (...continued)
structures are simply not 'poles' under the Act." EEI at 5

6 47 C.F.R. §224(a)(4) states that "[t]he term 'pole attachment' means any attachment by a cable television system or provider of telecommunication service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."

7 See EEI at 6. "Siting wireless equipment is usually the reason for seeking attachments to transmission structures. It is for that reason, for instance, that existing joint-use arrangements with LECs and existing cable television attachment agreements have never covered transmission structures."

to attach fiber optic cable to transmission facilities technically feasible. Therefore, the Commission must set formulaic rates for wireline attachment to transmission facilities.

C. The Commission Should Immediately Adopt MCI's Transmission Facility Proposals

Very little effort would be involved in adapting the Commission's existing pole attachment formula to electric utility transmission facilities. The relevant asset and expense accounts are found in FERC Accounts 354, and 355; and an allocated share of Accounts 566, 571.1, 571.3, 574.1, and 574.3.[8] The Commission could immediately initiate a FNPRM to determine presumptive heights, and usable space on transmission facilities. In the meantime, the Commission should require electric utilities to estimate transmission pole height and usable space; and make those estimates available for negotiations.

III. The Commission Should Establish Cost-Based Formulae Determining Presumptive Maximum Rates For Attaching to Poles, Conduits, and Transmission Facilities

A. Market Negotiations Will Not Yield Just and Reasonable Pole Attachment Rates

The market for public rights-of-way is highly concentrated. Moreover, bargaining power is not evenly distributed among negotiating parties. Consequently, parties supplying this market would be able to set prices far in excess of competitive levels if rates were determined through market negotiations. The only way to achieve just and reasonable rates for attachments to public rights-of-way is for regulators to establish rates close to economic cost.

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[8] See Attachment 1.

The electric utilities develop a number of arguments supporting their proposal to rely solely on market negotiations to set pole attachment rates. These arguments either misidentify the suppliers of rights-of-way, or misidentify the market altogether. Consequently, one must begin an analysis of the competitiveness of the market for rights-of-way, by properly identifying the boundaries of this market.

1. The market for pole attachments includes all public rights-of-way needed by utilities to provide ubiquitous facilities-based service in a franchise area or serving territory

It is commonly accepted that there are two dimensions to a market: the type of good or service supplied — known as the product market; and the geographic span of space buyers are willing to navigate in order to purchase a good or service — known as the geographic market.[9] In general, products or geographic regions that are ready substitutes for each other are probably in the same market. If they are good substitutes for each other, it would be difficult for any one product or region to elevate its price above existing levels for any significant period of time, for its customers would flee to substitute products and regions.

Market definition starts with a narrow view of the products and region, and continually adds less similar products and less proximate regions. If common sense

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[9]See, Philip Areeda and Donald F. Turner, *Antitrust Law*, 7 volumes, Little, Brown, 1978; F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, Third Edition, 1991; William G. Shepherd, *The Economics of Industrial Organization*; Second Edition, 1985.

suggests the addition of another product or region would be able to prevent existing firms and regions from significantly raising their price above existing levels for a significant period of time, then the additional product or region is part of the market.

a. Geographic market

What is the geographic market for rights-of-way? The consumer in this case is the company wishing to provide electric, telephone, cable, water, or other utility service. The supplier is the franchising authority, plus incumbent utility companies. In order to gain franchise approval, a utility presents information to the franchising authority regarding its proposed products, and the geographic area over which it proposes to make those products available. Since the utility may want to provide service solely over its own facilities, its has a potential demand for access to rights-of-way throughout its franchise territory. The geographic market is therefore at least as large as a utility's requested franchise area. Rights-of-way supplied outside a company's franchise area are unlikely to be of any use, so expanding the geographic market beyond the franchise area will not exert pricing discipline on suppliers in the entrant's franchise area. Consequently, the geographic market is coterminous with the utility's requested franchise area. Once a franchise is granted and the franchise area determined, the utility is obligated to provide service to all that request service within its service territory.

b. Product market determination

The product market for rights-of-way is primarily the market for access to or use of *public* rights-of-way. These rights-of-way are granted by public authorities to public

or private entities that are authorized to provide services in the public interest. Utility companies have been granted access to public rights-of-way once state or municipal authorities have determined their service is in the public interest and requires such access. The current product market for rights-of-way has two sources of supply: 1) new rights-of-way may be made available to a new entrant (or incumbent) by the franchising authority or municipality; and 2) unused capacity on rights-of-way granted to incumbent utilities may be made available.

The supply of new rights-of-way is controlled by state and municipal authorities. As commentors have noted, public authorities are hesitant to expand the supply of public rights-of-way to permit access to every household in a new local entrant's requested franchise area, for that would require digging up all streets, or placing poles to carry additional wires above ground.[10] MCI is often able to negotiate access to new rights-of-way from municipalities in order to house fiber rings or carry high volume point-to-point transmission cables. However, these rights of way are limited to transmission networks, and do not reach down to the level of distribution to individual customers. MCI often experiences difficulty obtaining construction permits needed to install even these limited facilities on public rights-of-way. Very often municipalities withhold construction permits until a franchise agreement has been negotiated. It can take anywhere from three months to three years to negotiate a franchise agreement.[11]

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[10] AT&T at 3; Tele-Communications Inc., at 5.

[11] New entrants often experience difficulty obtaining a business license, even if they have no need for their own rights of way and intend to rely

(continued...)

Shared use of conduit is a desirable method for new entrants to install their distribution facilities to end-users. Conduit is secure, and permits installation by pulling through an existing structure, with minimal disruption to public streets and buildings. It is also possible to pull fiber cable through a single electric duct within a conduit.[12] There are two overlapping suppliers of conduit rights-of-way: incumbent local exchange and electric utilities.[13]

While natural gas lines are buried underground, it is either not possible or not desirable to utilize their rights of way for telecommunications purposes. Unlike electric and telecommunications conduit, there is no excess capacity in natural gas underground rights-of-way. Natural gas distribution systems do not have reserve lines buried in their underground rights-of-way, so there are no empty lines in their underground distribution networks through which a communications cable might be pulled. Natural gas lines are placed underground, but not in conduit systems, so there is no available excess conduit space through which a communications cable could be pulled. Finally, unlike electricity, which permits innerducting and joint use of a single

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11 (...continued)
solely on resale or unbundled elements.

12 MCI conceives of conduit and trench as "structures" capable of containing one or more ducts. A conduit is usually underground or on bridges. A trench is dug into the ground. Ducts refer to single enclosed tubes, or pipes, that may be capable of carrying multiple innerducts. Innerducts subdivide a duct into smaller channels.

13 Existing competitive access providers also have some conduit space available in urban core that may serve as a source of supply for transmission facilities.

duct, natural gas lines have valves that are periodically closed off. A communications cable could be pulled through an existing natural gas line, but it would eventually be cut. Consequently, natural gas rights of way do not permit attachments for distribution facilities that avoid digging up streets and causing major disruptions to traffic and business.[14] Water distribution systems exhibit the same limitations as natural gas distribution systems.

Joint use of poles is also desirable because poles provide a secure right-of-way, have excess attachment capacity, and cause minimal disruption to streets and business. Because of joint use pole agreements among incumbent electric and local exchange utilities, there is only one supplier of pole rights-of-way available for any specific customer a new entrant might wish to serve. Joint telephone, electric, natural gas, and water utility use of trench is technically feasible, but is only practical for new builds. On existing rights of way, the danger of cutting already laid utility lines is simply too great.

Thus, only electric and telephone utilities have local distribution networks capable of reaching all customers in a serving area. Of the 3 types of facilities capable of reaching every customer in a serving area (poles, conduit, and trenches) one finds

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[14] Abandoned natural gas pipelines may be used if the valves are removed. WilTel used its abandoned interstate pipeline to lay its communications cables. There are only a limited number of abandoned interstate pipelines, and these would be used primarily for long-distance service. See *LLDS to Buy WilTel Services*, Public Utilities Fortnightly, October 1, 1994. Natural gas pipelines may also make use of rights of way that would permit a new entrant to place transmission facilities parallel to the pipeline.

the following sources of supply:

- one supplier of pole rights-of-way (provided jointly by incumbent electric and local exchange companies);
- two suppliers of distribution conduit rights-of-way capable of reaching all customers (incumbent electric and local exchange conduit systems);
- three suppliers of transmission conduit rights-of-way suitable for transmission cable (incumbent electric and local exchange conduit systems, plus new conduit supplied by municipality); and
- no suppliers of trench rights of way capable of reaching all customers in a franchise area.

Table I summarizes the number of suppliers a new entrant would be able to negotiate with for different types facilities and geographic areas.

Table I
Rights-of-way Suppliers

	Transmission Network			Distribution Network		
Facility	Incumbents	Municipal	Total	Incumbents	Municipal	Total
Poles [1]	1	0	1	1	0	1
Conduit[2]	2	1	3	2	0	2
Trenches[3]	0	0	0	0	0	0
TOTAL	**3**	**1**	**4**	**3**	**0**	**3**

Notes:

1. Municipalities do not generally permit new entrants to erect poles in downtown, urban areas. Incumbent electric & telephone companies share a single ubiquitous pole network.
2. Municipalities effectively limit access to new rights of way for conduit to placement of the high volume facilities of new entrants. Only existing electric and telephone companies have excess conduit capacity or duct sharing-capability.
3. Joint use of trenches is only desirable for new builds. New builds do not have the ability to reach a complete distribution network. Trenches are generally not secure enough for transmission facilities.

The limited number of suppliers yields a highly concentrated market for public rights-of-way required to serve the geographic market required for local entry. While the economic literature of the 1970s and early 1980s discounted the existence of a smooth, continuous relation between concentration ratios and monopoly profits asserted by the earliest industrial organization economists, rigorous economic analysis has established that concentration does have a direct relationship with market power.[15]

Determining the degree of market concentration is a useful place to begin determining the degree of competition in this market.[16] The discussion above identifies at most three major suppliers (incumbent LEC, incumbent electric, and municipality). If they each supplied 30 percent of the market (leaving 10 percent to be supplied by natural gas, water for transmission network access) the Hirfindahl-Hirschman Index (HHI) of at least 2700. The Department of Justice Merger Guidelines consider an HHI greater than 1800 to be highly concentrated. The guidelines presume that a merger increasing the HHI form 1800 to 1900 would permit the post merger firm to exercise

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15 "Some authors, for example, Demsetz suggest that there is no theoretical analysis that establishes a general link between concentrations indexes and monopoly power without making special assumptions about entry conditions. For various static and dynamic models of oligopolistic competition, however, most of the measures of concentration including the entropy measure do have a direct relationship with the degree of monopoly." See Alexis Jacquemin, The New Industrial Organization: Market Forces and Strategic Behavior, MIT Press, 1991, at 53.

16 "...indexes of concentration are not measures that allow the prediction of performance on the basis of causal relationship, but rather form approximations of these performances." *Id.*, at 62.

market power.[17] One would have to gather formidable amount of evidence of competitive dynamics and ease of entry in order to show that a market this concentrated could yield competitive rates through market negotiation.

2. Electric utility arguments misrepresent the dynamics of the market for public rights-of-way

The Electric utilities do not dispute this characterization of the market for public rights-of-way.[18] Nevertheless, they argue that the bargaining strength and market alternatives of new entrants limit the ability of existing suppliers to exercise market power that might otherwise be associated with such a concentrated market.

First, they point to the fact that some cable and competitive access providers have their own conduit systems.[19] It is true that some cable companies and interexchange carriers own some conduits and other facilities. However, these facilities are not extensive enough to serve every customer in a local utility's requested franchise area, which is the geographic market under consideration. Only the incumbent telephone and electric utilities, along with the municipalities, can supply this

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17 See *Department of Justice 1992 Merger Guidelines*. "Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise. The presumption may be overcome by a showing that factors set forth in Sections 2-5 of the Guidelines make it unlikely that the merger will create or enhance market power or facilitate its exercise, in light of market concentration and market shares."

18 "Based on a pure structural standard, any measure of concentration for the pole attachment or conduit access market is extremely high." AEP, Reed Attachment (Reed) at 35.

19 Reed at 36.

product to the geographic market. The facilities owned by cable and interexchange companies cannot be expanded upon to serve the entire franchise area of a new entrant.

Second, the electric utilities argue that the market for public rights-of-way extends beyond access to new real-estate or existing physical facilities, and includes access to incumbent LEC wholesale services and unbundled elements.[20] Common sense suggests that the use of incumbent LEC wholesale services or unbundled network elements is outside the product market for public rights-of-way, since by definition, services provided solely through resale and unbundled network elements do not require public rights-of-way by the new entrant.

Economic analysis would examine the ease with which a new utility can offer service through unbundled elements or resale does affect the elasticity of demand for rights-of-way. The easier and more affordable it is to provide service by these means, the greater is the elasticity of demand for rights-of-way, and the smaller is the ability of incumbents to exercise market power over existing rights-of-way. If this elasticity were large enough, one could claim that wholesale services and unbundled elements would be able to limit a significant increase in the price of rights-of-way. However, the market for wholesale services and unbundled elements will not sufficiently limit the exercise of market power by suppliers of rights-of-way. Provision of wholesale local services and unbundled elements is not yet established, and incumbent LEC delays and

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[20] Reed at 36.

overcharges are closing this off as a viable means of entry.[21] Because these products do not permit new entrants to take advantage of local market opportunities in a timely manner, they are unable to exercise pricing discipline on the existing suppliers of rights-of-way.[22] Consequently, one may not include them in the rights-of-way market.

Third, the electric utilities argue that wireless technologies, which allegedly do not require rights-of-way, may be used instead of wireline technologies.[23] However, a wireless provider must own spectrum, a public right-of-way. Many new entrants do not own spectrum. In addition, wireless technologies do require access to public rights-of-way. Transceivers and transmitters must be located on existing physical facilities, and a line of sight must be available to every customer served.

Fourth, the electric utilities argue that since telecommunications is not their core business, and their telecommunications affiliate will be a new entrant to the telecommunications business, they are somehow unable to "exert significant control over the means of competition."[24] This argument is without merit. Congress clearly

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21 See Attachment 2, Letter from Jonathan B. Sallet to Reed Hundt, July 10, 1997.

22 Section 3.4 of the DOJ Merger Guidelines identifies the inability to make timely responses to market opportunities as a condition strongly limiting the effectiveness of potential entry to discipline existing markets. "However, entry, although likely, will not be sufficient if, as a result of incumbent control, the tangible and intangible assets required for entry are not adequately available for entrants to respond fully to their sales opportunities."

23 Reed at 36.

24 Reed at 37.

viewed rights-of-way as a scarce resource requiring the establishment of cost-based rates. In §251(b)(4) of the 1996 Act, Congress required all local exchange carriers, including new entrants, to comply with the Pole Attachment Act. Electric utilities do have an economic incentive to overcharge users of their rights-of-way. The proliferation of incentive regulation in the electric industry permits shareholders to capture a portion of these monopoly overcharges. While the imputation requirement of §224(g) theoretically limits electric utility incentives to insist on monopoly rates (since doing so would disadvantage its telecommunication's affiliate with respect to incumbent LECs), unless cost-based rates are required, the electric utility would be able to impute an individual "market" rate that could differ significantly from rates charged to competitors. Congress explicitly recognized that utilities that provide communications over their rights of way are the most likely to enter the telecommunications business, and are therefore the most likely to resist attachment to rights-of-way that they control.[25]

Finally, the electric utilities argue that since a number of the new entrants are large, well financed-companies, they will be able to bargain from a position of equality, perhaps superiority, with electric utilities.[26] The electric utilities point to various negotiated joint-use arrangements with incumbent LECs as evidence that negotiation results in just and reasonable rates. However, negotiations between incumbent LECs and electric utilities are premised on three conditions that do not apply to the

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[25] 47 C.F.R. §224(a)(1).

[26] AEP at 10; Reed at 8; EEI at 10; EUC at 9.